In the Court of Appeals of the State of Alaska

Gilbert R Johnson, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13588** **Order** Date of Order: **February 21, 2020**

Trial Court Case No. **1PW-18-00128CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Gilbert Rusty Johnson Jr. was convicted of criminally negligent homicide. The judgment in Johnson's case was distributed on August 29, 2019. Accordingly, any notice of appeal was due by September 30, 2019.[1]

Johnson did not file a notice of appeal before the expiration of this deadline. Rather, Johnson filed a notice of appeal, along with a motion to accept his late-filed notice of appeal, on January 15, 2020 — three-and-a-half months after the deadline.

Alaska Appellate Rule 521 authorizes an appellate court to relax or dispense with a rule of appellate procedure — such as a filing deadline — if strict adherence to the rule will work an injustice. But Appellate Rule 521(1) also declares that, "[i]n a matter involving the validity of a criminal conviction or sentence, this rule does not authorize an appellate court . . . to allow the notice of appeal to be filed more than 60 days late[.]" *See also* Alaska Appellate Rule 502(b).

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[1] Under Alaska Appellate Rule 204(a)(1), the notice of appeal was due 30 days following distribution of the judgment. Because that date fell on a Saturday (September 28), Johnson's deadline for filing an appeal expired on Monday, September 30. *See* Alaska Appellate Rule 502(a).

We have recognized, however, that this rule cannot be applied to deny a defendant the right to pursue an appeal when the failure to timely file the notice of appeal is due to attorney neglect. Accordingly, this Court has accepted late notices of appeal, even those filed more than 60 days late, when the uncontested facts demonstrated that the delay was caused by ineffective assistance of counsel. *See, e.g.*, *Belluomini v. State*, File No. A-13306 (Order dated Nov. 26, 2018); *Nyako v. State*, File No. A-13157 (Order dated July 16, 2018); *Backford v. State*, File No. A-12995 (Order dated Nov. 22, 2017); *Hoehne v. State*, File No. A-12815 (Order dated Mar. 16, 2017); *Stacy v. State*, File No. A-12668 (Order dated Nov. 1, 2016); *Custer v. State*, File No. A-11901 (Order dated Mar. 28, 2014).

In the motion to accept Johnson's late filing, Johnson's current attorney, Assistant Public Advocate Brooke Berens, alleges the following facts:

Johnson pleaded guilty to criminally negligent homicide and was sentenced in late August 2019. He was represented by former Assistant Public Advocate Alexander Foote. As part of Johnson's sentence, the court revoked Johnson's driver's license for a period of 10 years. According to Foote, the length of the license revocation was left open to the judge's discretion and was contested at sentencing.

In early December — several months following sentencing and the distribution of the criminal judgment — Foote left the Office of Public Advocacy. He did not file a notice of appeal in Johnson's case.

In early January, Berens contacted Johnson to discuss a newly-issued restitution judgment. At that time, Johnson told Berens that he had spoken with Foote about the possibility of challenging the length of the license revocation.

Berens then contacted Foote. Foote agreed that he had discussed with Johnson his right to appeal the length of the revocation. He said that Johnson was going to get back to him if he wanted to appeal, but Foote did not recall Johnson ever getting back to him.

Berens again contacted Johnson. Johnson told Berens that he had left a message for Foote on September 10 asking him to appeal the revocation, but he never received a response. When confronted with this information, Foote said that he did not remember ever receiving a voicemail from Johnson, but he also acknowledged that it was possible that he missed the voicemail given his caseload and departure from the Office of Public Advocacy.

In the motion to accept Johnson's late filing, Berens asserts that Johnson's appeal would have been filed by September 30 if Foote had received and timely acted upon Johnson's September 10 voicemail. Citing our order in *Belluomini v. State*, File No. A-13306 (Order dated nov. 26, 2018), where we accepted a notice of appeal that was filed 155 days late, Berens argues that no purpose would be served by requiring Johnson to litigate a post-conviction relief claim against Foote.

The State opposes Johnson's motion. The State argues that under Appellate Rules 502(b) and 521(1), this Court lacks the authority to accept a notice of appeal that is more than 60 days late. The State suggests that, in our prior orders in *Cleveland v. State*, File No. A-13181, and *Akeya v. State*, File No. A-13182, we held that the proper remedy under these circumstances is for this Court to deny the motion to accept late-filed appeal and convert the motion to an application for post-conviction relief to be litigated in the superior court.

We disagree with the State's characterization of our holding in *Cleveland* and *Akeya*. Our orders in those cases clearly state that we do have the authority to accept a late-filed notice of appeal outside the deadline set out in Appellate Rule 521(1) if the failure to timely file the appeal was indisputably the result of attorney neglect. *Cleveland v. State*, File No. A-13181 & *Akeya v. State*, A-13182 (Orders dated April 22, 2019, at 9, & June 14, 2019, at 1-2).

That said, the problem we face in this case is that the underlying allegation of attorney neglect is not clear-cut. In *Belluomini v. State*, File No. A-13306 (Order dated Nov. 26, 2018), the order cited by Johnson in his motion, the attorney who had represented Belluomini in the superior court admitted that she had provided ineffective assistance of counsel by failing to file the notice of appeal. The attorney acknowledged in an affidavit that she had intended to file a notice of appeal on Belluomini's behalf and that she had "no excuse" for failing to do so.

In contrast, in this case, it is not clear precisely what happened between Johnson and his former attorney regarding the filing of the notice of appeal. Johnson asserts that he left Foote a voicemail stating his desire to appeal. Foote acknowledges the possibility that Johnson left such a voicemail, but does not recall ever receiving one. This is not a case where no reasonable person could dispute the fact of attorney neglect, or where the facts of the case are essentially undisputed. Moreover, we have not received an affidavit from either Foote or Johnson, so the motion is premised solely on hearsay statements made to Johnson's current attorney.

Accordingly, we conclude that this is the type of factual dispute that must be resolved first in a post-conviction relief action, where evidence can be presented and

the witnesses can be cross-examined.

Accordingly, IT IS ORDERED:

1. Referral to the Superior Court. This case is remanded to the superior court with directions to convert the motion to accept late-filed appeal into an application for post-conviction relief. We direct the Appellate Clerk's Office to transmit a copy of the file in this case to the superior court.

At Johnson's request, the superior court shall bifurcate the attorney neglect issue (*i.e.*, whether attorney neglect resulted in the late-filed appeal) from any other post-conviction relief issues that Johnson may wish to pursue, and the court shall stay litigation on the remaining claims. The court shall expedite action on the attorney neglect claim related to the late-filed appeal.

2. Additional guidance. Because this application for post-conviction relief needs to be litigated and resolved on an expedited basis, we provide the following additional guidance to the superior court.

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), it is *per se* ineffective assistance of counsel for an attorney to fail to file a notice of appeal in a criminal case if the defendant timely requested an appeal. Because filing a notice of appeal is a "purely ministerial task," a defendant who instructs counsel to initiate an appeal "reasonably relies upon counsel to file the necessary notice." *Id.* at 477.

The remedy for this *per se* ineffective assistance of counsel is to reinstate the appeal. *Id.* at 484; *see also Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska App.

1995). To obtain this remedy, a defendant need not demonstrate that he would have been able to raise meritorious issues on appeal. *Flores-Ortega*, 528 U.S. at 486.

The right at stake in these cases is a defendant's right to first-tier appellate review. *See Stone v. State*, 255 P.3d 979, 982 (Alaska 2011) ("[F]irst-tier review differs from subsequent appellate stages at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court." (alteration in original) (quoting *Halbert v. Michigan*, 545 U.S. 605, 611 (2005) (citation omitted) (internal quotation marks omitted))).

3. Conclusion. Because we are remanding Johnson's case with directions to convert his motion to a post-conviction relief application for this litigation, we direct the Appellate Clerk's Office to close this file. If the superior court grants relief to Johnson, he may move to reopen this appeal, or file the necessary paperwork to initiate a new appeal.

Entered at the direction of the Court.

Clerk of the Appellate Courts

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Meredith Montgomery

cc: Court of Appeals Judges
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